

No. 1803

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

DAVID E. BURLEY,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA and THE
COUNTY OF CANYON, IDAHO,

Defendants in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States Circuit Court for the
District of Idaho, Central Division.

FILED
JAN 27 1910

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

DAVID E. BURLEY,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA and THE
COUNTY OF CANYON, IDAHO,

Defendants in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States Circuit Court for the
District of Idaho, Central Division.

INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Addresses and Names of Attorneys.....	1
Amended Answer, Motion to Strike Portions from the	38
Amended Answer, Order Denying the Motion to Strike Portions from the	39
Amended Answer to the Amended Complaint..	34
Amended Complaint	21
Amended Complaint, Amended Answer to....	34
Amended Complaint, Answer to.....	29
Amended Complaint, Demurrer (Filed March 4, 1909) of David E. Burley to the.....	27
Amended Complaint, etc., Order Allowing the Amendment of the Answer to the.....	33
Amended Complaint, etc., Order Overruling the Demurrer to the	29
Amended Complaint, Order Sustaining the De- murrer to, in Part, etc.....	19
Amendment of the Answer, to the Amended Complaint, etc., Order Allowing the.....	33
Amendment of the Complaint, Notice of.....	17
Answer, Amended, Motion to Strike Portions from the	38

Index.	Page
Answer, Amended, Order Denying the Motion to Strike Portions from the.....	39
Answer, Amended, to Amended Complaint....	34
Answer to Amended Complaint.....	29
Answer to the Amended Complaint, etc., Order Allowing the Amendment of the.....	33
Assignment of Errors	62
Bond on Writ of Error.....	64
Certificate of Clerk U. S. Circuit Court to Tran- script of Record	71
Citation (Original)	68
Complaint	1
Complaint, Amended	21
Complaint, Amended, Amended Answer to....	34
Complaint, Amended Answer to.....	29
Complaint, Amended, Demurrer (Filed March 4, 1909) of David E. Burley to the.....	27
Complaint, Amended, etc., Order Allowing the Amendment of the Answer to the.....	33
Complaint, Amended, etc., Order Overruling the Demurrer to the	29
Complaint, Amended, Order Sustaining the De- murrer to, in Part, etc.....	19
Complaint as Amended, Demurrer Filed Feb- ruary 11, 1909, of David E. Burley to the..	15
Complaint, Demurrer (Filed January 27, 1909) of David E. Burley to the.....	13
Complaint, Notice of, Amendment of the.....	17
Complaint, Order Giving Plaintiff Permission to Amend the	18

Index.	Page
Default of the Defendant Canyon County, Idaho	40
Demurrer (Filed January 27, 1909) of David E. Burley to the Complaint	13
Demurrer (Filed February 11, 1909) of David E. Burley to the Complaint as Amended . . .	15
Demurrer (Filed March 4, 1909) of David E. Burley to the Amended Complaint	27
Demurrer to the Amended Complaint, etc., Or- der Overruling the	29
Demurrer to the Amended Complaint, Order Sustaining in Part, etc.	19
Findings of Fact and Conclusions of Law	42
Judgment	47
Minutes of the Court—Trial—Friday, March 12, 1909	33
Motion for an Order to Proceed Under Section 738 R. S., U. S., etc.	8
Motion to Strike Portions from the Amended Answer	38
Motion to Strike Portions from the Amended Answer, Order Denying the	39
Names and Addresses of Attorneys	1
Notice of Amendment of the Complaint	17
Opinion	52
Order Allowing the Amendment of the Answer to the Amended Complaint, etc.	33
Order Allowing Writ of Error, etc.	63
Order Denying the Motion to Strike Portions from the Amended Answer	39
Order Directing Personal Service of Order, etc.	11

Index.	Page
Order Directing the Defendant to Appear, etc..	10
Order Giving Plaintiff Permission to Amend the Complaint	18
Order Limiting the Defendants' Time to Plead, etc.....	20
Order of Condemnation	50
Order Overruling the Demurrer to the Amended Complaint, etc.....	29
Order Sustaining the Demurrer to the Amended Complaint in Part, etc.....	19
Order to Proceed Under Section 738, R. S., U. S., etc., Motion for an.....	8
Petition for Writ of Error.....	61
Return to Writ of Error	70
Summons	6
Transcript of Record, Certificate of Clerk U. S. Circuit Court to.....	71
Trial—Minutes of the Court—Friday, March 12, 1909	33
Verdict	41
Writ of Error (Original)	67
Writ of Error, Bond on	64
Writ of Error, etc., Order Allowing.....	63
Writ of Error, Petition for	61
Writ of Error, Return to.....	70

[Names and Addresses of Attorneys.]

C. H. LINGENFELTER, U. S. Attorney for the
District of Idaho,

Attorney for Defendant in Error.

JOHN G. WILLIS, Esq., Ogden, Utah,

Attorney for Plaintiff in Error.

*In the Circuit Court of the United States in and for
the Central Division of the District of Idaho.*

THE UNITED STATES,

Plaintiff,

vs.

DAVID E. BURLEY and the COUNTY OF CAN-
YON, IDAHO,

Defendants.

Complaint.

The Honorable Secretary of the Interior, proceeding under and by virtue of Section Seven, Act of June 17, 1902, Chapter 1093, 32 Statutes at Large 388 of Congress of the United States, entitled "An Act Appropriating the Receipts from the Sale and Disposal of Public Lands in Certain States and Territories for the Construction of Irrigation Works for the Reclamation of Arid Lands," respectfully represents:

First: That this action is brought by the authority of the Attorney General of the United States, on behalf of the United States, pursuant to application made therefor by the Honorable Secretary of the Interior of the United States proceeding under the Act of Congress above mentioned.

Second: That the Honorable Secretary of the Interior of the United States has heretofore caused to be surveyed and located a certain irrigation project in the State of Idaho, known as the "Payette-Boise Project," and has determined that the same is practicable, and has let the contracts for the construction thereof, said project being situate in the Counties of Ada and Canyon, in the Central Division of the District of Idaho. That said irrigation project includes, as a part thereof, the construction of a reservoir in Canyon County, Idaho, commonly known and designated as the "Deer Flat Reservoir," and that the site for said reservoir includes the following described land in Canyon County, Idaho, to wit: The Southeast quarter (SE. $\frac{1}{4}$) of Section One (1), Township Two (2) North, Range Three (3) West B. M., and all that part of the Northeast quarter (NE. $\frac{1}{4}$) of Section Twelve (12), in said Township Two (2), North, Range Three (3) West B. M., described as follows: Beginning at the Northeast corner of said Section Twelve (12), Township Two (2) North, Range Three (3) West B. M., thence running south 2,640 feet, to quarter corner between said Section Twelve (12), Township Two (2) North, Range Three (3) West B. M., and Section Seven (7), Township Two (2) North, Range Two (2) West B. M., thence west 1,160 feet, thence north $62^{\circ} 16'$ West 105 feet, thence north $55^{\circ} 56'$ West 260 feet, thence north $34^{\circ} 36'$ West 520 feet thence north $41^{\circ} 36'$ West 360 feet, thence north $59^{\circ} 56'$ West 350 feet, thence north $83^{\circ} 26'$ West 380 feet, thence north 1490 feet to quarter corner between Section Twelve (12) and Section One (1), both of Town-

ship Two (2) North, Range Three (3) West, thence east 2,640 feet to the place of beginning, containing 136 acres. That said reservoir is, at this time, in the actual course of construction and when completed the water impounded by said reservoir will completely overflow the above described tract of land, and it has become necessary that the plaintiff herein acquire title to the above-described tract of land for use as a part of said reservoir site, and for such purpose the said plaintiff, acting through the Honorable Secretary of the Interior, has been and now is desirous of purchasing and acquiring title in fee to said tract of land for the purposes aforesaid. That said irrigation project is being primarily constructed for the purpose of supplying water for irrigation to arid lands in Ada and Canyon Counties in the State of Idaho, which are public lands of the United States.

Third: That the title to said tract of land stands on the records of the County of Canyon, Idaho, in the said defendant, David E. Burley, and that said defendant is capable of conveying title in fee to said premises, free and clear of all incumbrances, excepting the interest therein of the defendant, the County of Canyon, Idaho. That the said defendant, the County of Canyon, Idaho, claims some interest, estate or title in said premises, on account of the purchase by said County of the premises above described under a sale thereof for the taxes of 1896, made by said County, said certificate bearing date July 1, 1897.

Fourth: That a disagreement has occurred and now exists between defendants and the said plaintiff, concerning the purchase of said tract of land by plaintiff,

in this, to wit: That the plaintiff and the said defendants are unable to agree upon a price for said land which this plaintiff considers to be reasonable, and that said defendants ask and demand therefor a price which in the opinion of plaintiff is more than said land is worth. That said plaintiff, under and by virtue of the proceedings hereby instituted and to be continued in its behalf, proposes and offers to purchase said tract, hereinbefore described.

Fifth: That the use of said premises is absolutely necessary in the construction of said reservoir, and that the plaintiff intends in good faith to complete the improvements for which said property is condemned.

Sixth: That the reasonable value of said property does not exceed Ten Dollars per acre, amounting to Two Thousand Nine Hundred Sixty Dollars, and this plaintiff offers to purchase said property at said valuation.

Seventh: That said defendant, David E. Burley, is not married.

Eighth: That the State, County and School taxes against said premises for 1908, are undetermined and unpaid.

Wherefore, plaintiff prays judgment as follows: That it be adjudged that the public use requires the condemnation of the real property herein above described, and that plaintiff be entitled to take and hold title in fee to said property for the public use specified, upon making compensation therefor, and that this Court proceed to determine in the manner provided by law the compensation to be paid by this plaintiff to defendants for said property, and that the accruing

taxes be deducted therefrom and to determine what interest the defendant, the county of Canyon, Idaho, has in said premises, and that plaintiff be granted such other and further relief as in the premises may be proper.

C. H. LINGENFELTER,
U. S. Attorney for the District of Idaho.

State of Idaho,
County of Ada,—ss.

Fred L. Cavis, being first duly sworn, on oath, says that he is the Chief Clerk of the United States Reclamation Service for the State of Idaho; that he has read and knows the contents of the foregoing complaint, and that the same is true of his own knowledge, except as to the matters therein stated to be upon information or belief, and as to those matters he believes them to be true.

FRED L. CAVIS.

Subscribed and sworn to before me this 2d day of October, 1908.

[Seal]

HUGH E. McELROY,
Notary Public.

[Endorsed]: Filed Oct. 5, 1908. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho, Central Division.

No. 56.

THE UNITED STATES

vs.

DAVID E. BURLEY and the COUNTY OF CANYON, IDAHO.

Summons.

The President of the United States, to David E. Burley and the County of Canyon, Idaho, the Above-named Defendant, Greeting:

You are hereby commanded to be and appear in the above-entitled Court, holden at Boise, in said District and answer the complaint filed against you in the above-entitled action within twenty days from the date of the service of this Summons upon you, if served within the Central Division of said district, or if served within any other Division of said District, then within forty days from the date of such service upon you; and if you fail so to appear and answer, for want thereof, the plaintiff will apply to the court for the relief demanded in the complaint, to wit:

That it be adjudged that the public use requires the condemnation of the real property described in said complaint, and that the plaintiff be entitled to take and hold title in fee to said property for the public use specified, upon making compensation therefor, and that plaintiff be granted such other and further relief in the premises as may be proper.

The facts more fully appearing in plaintiff's complaint, a certified copy of which is served herewith and made a part hereof to which you are hereby referred.

And this is to command you the Marshal of said district, or your deputy to make due service and return of this Summons. Hereof fail not.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, and the seal of said Circuit Court, affixed at Boise, in said District, this 20th day October, 1908.

[Seal]

A. L. RICHARDSON,
Clerk.

I hereby certify that I received the within Summons at Boise, Ada County, Idaho, on October 21st, 1908, together with a certified copy of the complaint, and that I served the same upon the County of Canyon of the State of Idaho, by handing to and leaving with W. H. Platt, Chairman of the Board of County Commissioners of the said County of Canyon, personally a duplicate of the within Summons, together with a certified copy of the complaint, at Payette, Canyon County, Idaho, on October 31st, 1908.

After due search and diligent inquiry, I am unable to find David E. Burley within the District of Idaho.
Boise, Idaho, Nov. 2d, 1908.

S. L. HODGIN,
U. S. Marshal.
By E. W. Beemer,
Deputy.

[Endorsed]: No. 56. In the Circuit Court of the United States for the District of Idaho, Central Division. The United States vs. David E. Burley and the County of Canyon, Idaho. Summons. Returned and filed Nov. 11, 1909. A. L. Richardson, Clerk.

*In the Circuit Court of the United States in and for
the Central Division of the District of Idaho.*

THE UNITED STATES,

Plaintiff,

vs.

DAVID E. BURLEY and the COUNTY OF
CANYON, IDAHO,

Defendants.

**Motion [for an Order to Proceed Under Section
738 R. S., U. S., etc.]**

Now, comes C. H. Lingenfelter, Esq., U. S. Attorney for the District of Idaho, attorney for plaintiff herein and moves this Honorable Court for an order to proceed under Section 738 of the Revised Statutes of the United States, to obtain service upon the defendant, David E. Burley, on the ground that the Marshal returned the summons issued in this case endorsed with the statement that said defendant was not found in this District; and on the ground that said defendant does not reside within the district of Idaho, but resides at Salt Lake City, Utah.

Wherefore, plaintiff prays that an order be made herein requiring the said defendant to appear, plead,

answer or demur to the complaint in said action by a day certain to be designated by this Court and that said order may be served on said defendant wherever found.

This motion is made upon the records and files in this case, the return of the Marshal attached to the summons herein and the affidavit of Hugh E. McElroy herewith.

C. H. LINGENFELTER,
U. S. Attorney for the District of Idaho.

State of Idaho,
County of Ada,—ss.

Hugh E. McElroy, being first duly sworn upon oath, deposes and says:

That he is a legal assistant in the Reclamation Service of the United States for the District of Idaho, and makes this affidavit on behalf of the plaintiff herein. That the defendant, David E. Burley, is a resident of Salt Lake City, Utah, and that affiant has corresponded with him recently in relation to the above action, addressing said correspondence to said place and receiving answers thereto from said defendant at said Salt Lake City, Utah. That personal service cannot be made upon said defendant in the District of Idaho, of the summons herein as affiant is informed and believes.

HUGH E. McELROY.

Subscribed and sworn to before me this 12th day of December, 1908.

[Seal]

E. C. COOK,
Notary Public.

[Endorsed]: Filed Dec. 14, 1908. A. L. Richardson, Clerk.

*In the Circuit Court of the United States in and for
the Central Division of the District of Idaho.*

THE UNITED STATES,

Plaintiff,

vs.

DAVID E. BURLEY and the COUNTY OF CANYON, IDAHO,

Defendants.

Order [Directing the Defendant to Appear, etc.]

It appearing to this Court that the said defendant, David E. Burley, is not an inhabitant of the District of Idaho, and cannot be found therein, and that the said defendant has not voluntarily appeared in the above action; and it further appearing to the Court that the plaintiff has brought said action against the said defendant for the condemnation of certain lands described in the complaint in said action, situated in Canyon County, Idaho, for use by plaintiff in the certain irrigation project in Idaho, known as the "Payette-Boise-Project," and that said defendant is a necessary party to said action;

Now, therefore, you and each of you are hereby ordered to appear, plead, answer or demur to the complaint in said action by the 10th day of February, 1909, and upon failure so to do within the time so

limited, this Court will entertain jurisdiction over you for all the purposes of said action and proceed to the hearing and adjudication of the matters involved therein.

Dated this 14th day of December, 1908.

FRANK S. DIETRICH,
Judge.

I hereby certify that I served the within Order on the therein named defendant, David E. Burley, at Salt Lake City, in the District of Utah, on the 18th day of December, 1908, by delivering to him personally a certified copy thereof.

L. H. SMYTH,
United States Marshal,
By Julian Riley,
Chief Deputy.

[Endorsed]: Filed Dec. 14, 1908. A. L. Richardson, Clerk.

*In the Circuit Court of the United States in and for
the Central Division of the District of Idaho.*

THE UNITED STATES,
Plaintiff,
vs.

DAVID E. BURLEY and the COUNTY OF CANYON, IDAHO,
Defendants.

Order [Directing Personal Service of Order, etc.].

On this 14th day of December, 1908, came the said plaintiff by its attorney, C. H. Lingenfelter, Esq., and applied to this Court for an order directing certain

absent defendants to appear, plead, answer or demur in the above action by a day certain, and thereupon, the Court having granted said application and said order having been duly entered and made, reference being hereby made to the record of said order for the terms thereof, thereupon the said plaintiff by its attorney made due application to the Court for an order of this Court directing the method of service upon said defendants therein named of the order above mentioned.

And it appearing to the Court that the said defendant David E. Burley, resides at Salt Lake City, Utah, and that personal service cannot be made upon the said defendant within the district of Idaho, it is ordered that personal service of said order be made upon said defendants wherever found.

Dated this 14th day of December, 1908.

FRANK S. DIETRICH,

Judge.

[Endorsed]: Filed Dec. 14th, 1908. A. L. Richardson, Clerk.

*In the Circuit Court of the United States, Central
Division, District of Idaho.*

THE UNITED STATES,

Plaintiff,

vs.

DAVID E. BURLEY et al.,

Defendants.

**Demurrer [(Filed January 27, 1909) of David E.
Burley to the Complaint].**

The defendant, David E. Burley, demurs to the complaint filed herein, for the reasons, and upon the grounds, following:

I.

Because said complaint does not state facts sufficient to constitute a cause of action.

II.

Because said complaint is uncertain in the following particulars:

1st. It cannot be ascertained therefrom what, if any, lands are owned, or possessed, by the plaintiff in Ada County, Idaho.

2d. It cannot be ascertained therefrom what, if any, lands are owned, or possessed, by the plaintiff in Canyon County, Idaho.

3d. It cannot be ascertained therefrom, what, if any, lands owned, or possessed, or in which the plaintiff is in anywise interested, are irrigable in either of the said counties, or elsewhere, which it is purposed to irrigate by the system mentioned and described in said complaint.

4th. It does not appear from said complaint whether or not the said plaintiff purposes using the waters for any purpose connected with any of the constitutional or legal functions of the plaintiff; or whether it purposes furnishing the said waters for use in whole, or in part, by private parties; or to persons for the purpose of irrigating lands possessed, or owned, by private individuals.

5th. It does not appear therefrom whether or not the therein mentioned irrigation project, and said reservoir, or either thereof, are necessary to the performance of any constitutional, or governmental function of plaintiff.

JNO. G. WILLIS,
Attorney for said Defendant.

I hereby certify that the above demurrer is, in my opinion, well founded in point of law.

JNO. G. WILLIS,
Attorney for said Defendant.

Service of a copy of the within demurrer is hereby acknowledged this the 28th day of Jan., 1909.

VAN W. HASBROUK,
Asst. U. S. Atty.,
Attorney for Plaintiff.

[Endorsed]: Filed Jan. 27th, 1909. A. L. Richardson, Clerk.

*In the Circuit Court of the United States, Central
Division, District of Idaho.*

THE UNITED STATES,

Plaintiff,

vs.

DAVID E. BURLEY et al.,

Defendants,

**Demurrer [(Filed February 11, 1909) of David E.
Burley to the Complaint as Amended].**

The defendant, David E. Burley, demurs to the complaint as amended and filed herein, for the reasons, and upon the grounds, following:

I.

Because said complaint does not state facts sufficient to constitute a cause of action.

II.

Because said complaint is uncertain in the following particulars:

1st. It cannot be ascertained therefrom what lands are owned, or possessed, by the plaintiff in Ada County, Idaho.

2d. It cannot be ascertained therefrom what lands are owned, or possessed, by the plaintiff in Canyon County, Idaho.

3d. It cannot be ascertained therefrom what, if any, lands owned, or possessed, or in which the plaintiff is in anywise interested, are irrigable in either of the said counties, or elsewhere, which it is purposed to irrigate by the system mentioned and described in said complaint.

4th. It does not appear from said complaint whether or not the said plaintiff purposes using the waters for any purpose connected with any of the constitutional or legal functions of the plaintiff; or whether it purposes furnishing the said waters for use in whole, or in part, by private parties; or to persons for the purpose of irrigating lands possessed, or owned, by private individuals.

5th. It does not appear therefrom whether or not the therein mentioned irrigation project, and said reservoir, or either thereof, are necessary to the performance of any constitutional, or governmental function of plaintiff.

6th. It does appear from said complaint that it is the "primary" purpose of plaintiff to irrigate certain lands owned by it; but it does not appear from said complaint whether or not it is necessary so to do; nor does it appear from said complaint what other and further uses plaintiff purposes making of said irrigation system—the averments with respect to said intended uses being inferential and evasive, and not direct or positive.

III.

7th. That said complaint is ambiguous in the particulars mentioned in the paragraphs numbered 1st, 2d, 3rd, 4th, 5th, and 6th of this demurrer.

JOHN G. WILLIS,

Attorney for said Defendant.

I hereby certify that the above demurrer, is, in my opinion, well founded in point of law.

JOHN G. WILLIS,

Attorney for said Defendant.

[Endorsed]: Filed Feb. 11, 1909. A. L. Richardson, Clerk.

*In the Circuit Court of the United States, Ninth
Judicial Circuit, for the District of Idaho, Cen-
tral Division.*

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

D. E. BURLEY, and the COUNTY OF CANYON,
IDAHO,
Defendants.

Notice [of Amendment of the Complaint].

To the Defendants Above Named and to Their Attorneys and Each Thereof:

You will please take notice that the plaintiff has amended its complaint, heretofore served upon you, and filed herein, upon its face to read as follows:

By inserting the word "primarily" between the words "being" and "constructed" on the last line of page "2" of its said complaint, making same read as follows: "That said irrigation project is being primarily constructed * * *"

By inserting the word "arid" before the word "lands" in line one at the top of page "3" of its said complaint, making it to read as follows: "for the purpose of supplying water for irrigation to arid lands * * *"

By adding after the words "State of Idaho" in the second line from the top of page "3" of its said complaint, the words "which are public lands of the

United States," making it read as follows: "in Ada and Canyon Counties in the State of Idaho which are public lands of the United States."

Dated this 5th day of February, A. D. 1909.

C. H. LINGENFELTER,
U. S. District Attorney and Attorney for Plaintiff.

Service of the foregoing notice acknowledged this 8th day of February, A. D. 1909, by receipt of a copy.

JOHN G. WILLIS,
Attorney for Defendant, D. E. Burley,

[Endorsed]: Filed Feb. 15, 1909. A. L. Richardson, Clerk.

**[Order Giving Plaintiff Permission to Amend the
Complaint.]**

At a stated term of the Circuit Court of the United States, for the District of Idaho, held at Boise, Idaho, on Monday the 15th day of February, 1909. Present: Hon. FRANK S. DIETRICH, Judge.

No. 56.

THE UNITED STATES

vs.

DAVID E. BURLEY et al.

Upon application of the U. S. District Attorney, permission was given to plaintiff to amend the complaint herein by interlineation.

**[Order Sustaining the Demurrer to the Amended
Complaint in Part, etc.]**

At a stated term of the Circuit Court of the United States, for the District of Idaho, held at Boise, Idaho, on Tuesday the 23d day of February, 1909. Present: Hon. FRANK S. DIETRICH, Judge.

No. 56.

THE UNITED STATES

vs.

DAVID E. BURLEY et al.

On this day this cause came on to be heard upon the demurrer of the defendant, David E. Burley, to the amended complaint herein. John G. Willis, Esq., appearing as counsel for said defendant and the demurrer and B. E. Stoutemyer, Esq., on behalf of plaintiff and against said demurrer, and after argument the Court being fully advised in the premises, ordered that said demurrer be sustained in part and overruled in part and that plaintiff have leave to file an Amended Complaint herein.

To the ruling of the Court in overruling said demurrer in part, the said defendant, David E. Burley, by his said Attorney, then and there, excepted in due form of law, which exception was allowed.

[Order Limiting the Defendants' Time to Plead etc.]

*In the Circuit Court of the United States in and for
the Central Division of the District of Idaho.*

THE UNITED STATES,

Plaintiff,

vs.

DAVID E. BURLEY, and the COUNTY OF CAN-
YON, IDAHO,

Defendants.

**ORDER SHORTENING TIME FOR DEFEND-
ANT TO PLEAD.**

Now, on this 25th day of February, 1909, on application of the plaintiff, good cause being shown therefor, it is hereby ordered that the time allowed the said defendant, David E. Burley, to plead to the amended complaint this day filed in the above action is hereby limited to and including the fourth day of March, 1909, said time being shortened hereby to the above date.

It is further ordered that the plaintiff make service of said amended complaint together with a copy of this order on this date by mailing the same to the attorney for the said defendant.

FRANK S. DIETRICH,

Judge.

[Endorsed]: Filed Feb. 25th, 1909. A. L. Richardson, Clerk.

*In the Circuit Court of the United States in and for
the Central Division of the District of Idaho.*

THE UNITED STATES,

Plaintiff,

vs.

DAVID E. BURLEY and the COUNTY OF CAN-
YON, IDAHO,

Defendants.

Amended Complaint.

The Honorable Secretary of the Interior, proceeding under and by virtue of Section Seven, Act of June 17, 1902, Chapter 1093, 32 Statute at Large 388 of Congress of the United States, entitled "An Act Appropriating the Receipts from the Sale and Disposal of public lands in certain States and Territories for the Construction of Irrigation Works for the Reclamation of Arid Lands," respectfully represents:

First: That this action is brought by the authority of the Attorney General of the United States, on behalf of the United States, pursuant to application made therefor by the Honorable Secretary of the Interior of the United States proceeding under the Act of Congress above mentioned.

Second: That the Honorable Secretary of the Interior of the United States has heretofore caused to be surveyed and located a certain irrigation project in the State of Idaho, known as the "Payette-Boise Project," and has determined that the same is prac-

licable, and has let the contracts for the construction thereof, said project being situate in the Counties of Ada and Canyon, in the Central Division of the District of Idaho. That said irrigation project includes, as a part thereof, the construction of a reservoir in Canyon County, Idaho, commonly known and designated as the "Deer Flat Reservoir," and that the site for said reservoir includes the following described land in Canyon County, Idaho, to wit: The Southeast quarter (SE. $\frac{1}{4}$) of Section One (1), Township Two (2) North, Range Three (3) West B. M. containing 160 acres, being the whole of an entire parcel or tract; and all that part of the Northeast quarter (NE. $\frac{1}{4}$) of Section Twelve (12), in said Township Two (2) North, Range Three (3) West B. M., described as follows: Beginning at the Northeast corner of said Section Twelve (12), Township Two (2) North, Range Three (3) West B. M., thence running south 2640 feet, to quarter corner between said Section Twelve (12), Township Two (2) North, Range Three (3) West B. M., and Section Seven (7), Township Two (2), North, Range Two (2) West B. M., thence west 1160 feet, thence north $62^{\circ} 16'$ West 105 feet, thence north $55^{\circ} 56'$ West 280 feet, thence north $34^{\circ} 36'$ West 520 feet, thence north $41^{\circ} 36'$ West 360 feet, thence north $59^{\circ} 56'$ West 350 feet, thence north $83^{\circ} 26'$ West 380 feet to the line between the NW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ of said Section 12; thence north 1490 feet to quarter corner between Section Twelve (12) and Section One (1), both of Township Two (2) North, Range Three (3) West; thence east 2640 feet to the place of beginning, con-

taining 136 acres, the same being only a part of the following entire tract or parcel, to wit: The northeast quarter of Section Twelve (12), Township Two (2) North, Range 3 West, B. M. That said reservoir is, at this time, in the actual course of construction and when completed the water impounded by said reservoir will completely overflow the above-described tract of land, and it has become necessary that the plaintiff herein acquire title to the above-described tract of land for use as a part of said reservoir site, and for such purpose the said plaintiff, acting through the Honorable Secretary of the Interior has been and now is desirous of purchasing and acquiring title in fee to said tract of land for the purposes aforesaid. That the Honorable Secretary of the Interior is authorized by law to acquire said lands by condemnation, and that in his opinion it is necessary and advantageous to the government that said lands should be so acquired. That said irrigation project is being primarily constructed for the purpose of supplying water for irrigation to arid lands in Ada and Canyon Counties in the State of Idaho, which are public lands of the United States and that more than 50,000 acres of public lands of the United States will be supplied with water for irrigation, and reclamation from the said project by means of said Deer Flat Reservoir. That said above-described land included in said reservoir is necessary for the use of the Government in the construction of said project.

Third: That the title to said tract of land stands on the records of the County of Canyon, Idaho, in

the said defendant, D. E. Burley, and that said defendant is capable of conveying title in fee to said premises, free and clear of all incumbrances, excepting the interest therein of the defendant, the County of Canyon, Idaho. That the said defendant, the County of Canyon, Idaho, claims some interest, estate or title in said premises, on account of the purchase by said County of the premises above described under a sale thereof for the taxes of 1896, made by said County, said certificate bearing date July 1, 1897.

Fourth: That a disagreement has occurred and now exists between defendants and the said plaintiff, concerning the purchase of said tract of land by plaintiff, in this, to wit: That the plaintiff and the said defendants are unable to agree upon a price for said land which this plaintiff considers to be reasonable, and that said defendants ask and demand therefor a price which in the opinion of plaintiff is more than said land is worth. That said plaintiff, under and by virtue of the proceedings hereby instituted and to be continued in its behalf, proposes and offers to purchase said tract, hereinbefore described.

Fifth: That the use of said premises is absolutely necessary in the construction of said reservoir, and that the plaintiff intends in good faith to complete the improvements for which said property is condemned.

Sixth: That the reasonable value of said property does not exceed Ten Dollars per acre, amounting to Two thousand nine hundred Sixty Dollars, and

this plaintiff offers to purchase said property at said valuation.

Seventh: That said defendant, David E. Burley, is not married.

Eighth: That the State, County and School taxes against said premises for 1908, are undetermined and unpaid.

Wherefore, plaintiff prays judgment as follows: That it be adjudged that the public use requires the condemnation of the real property herein above described, and that plaintiff be entitled to take and hold title in fee to said property for the public use specified, upon making compensation therefor, and that this Court proceed to determine in the manner provided by law the compensation to be paid by this plaintiff to defendants for said property, and that the accruing taxes be deducted therefrom, and to determine what interest the defendant, the County of Canyon, Idaho, has in said premises, and that plaintiff be granted such other and further relief as in the premises may be proper.

C. H. LINGENFELTER,

U. S. Attorney for the District of Idaho.

B. E. STOUTEMYER,

HUGH E. McELROY,

Counsel for Plaintiff.

State of Idaho,

County of Ada,—ss.

Fred L. Cavis, being first duly sworn, on oath says that he is the Chief Clerk of the United States Reclamation Service for the State of Idaho; that he has read and knows the contents of the foregoing com-

plaint, and that the same is true of his own knowledge, except as to the matters therein stated to be upon information or belief, and as to those matters he believes them to be true.

FRED L. CAVIS.

Subscribed and sworn to before me this 25th day of February, 1909.

[Seal]

HUGH E. McELROY,
Notary Public.

State of Idaho,
County of Ada,—ss.

B. E. Stoutemyer, being first duly sworn, says:

That on the 25th day of February, 1909, he enclosed a copy of the foregoing complaint and of the order of the Court made in said action on said date shortening the time in which the defendant might plead, in an envelope properly sealed with the postage thereon prepaid, which envelope was addressed John G. Willis, Esq., Attorney at Law, Salt Lake City, Utah, and on said date mailed said letter at the U. S. Postoffice at Boise City, Idaho.

B. E. STOUTEMYER.

Subscribed and sworn to before me this 25th day of February, 1909.

[Seal]

HUGH E. McELROY,
Notary Public.

[Endorsed]: Filed Feb. 25th, 1909. A. L. Richardson, Clerk.

*In the Circuit Court of the United States, Central
Division, District of Idaho.*

THE UNITED STATES,

Plaintiff,

vs.

DAVID E. BURLEY et al.,

Defendants.

**Demurrer [(Filed March 4, 1909) of David E. Burley
to the Amended Complaint.]**

The defendant, David E. Burley, demurs to the amended complaint filed herein, for the reasons, and upon the grounds, following:

I.

Because said complaint does not state facts sufficient to constitute a cause of action.

II.

Because said complaint is uncertain in the following particulars:

1st. It cannot be ascertained therefrom what lands are owned, or possessed, by the plaintiff in Ada County, Idaho.

2d. It cannot be ascertained therefrom what lands are owned, or possessed, by the plaintiff in Canyon County, Idaho.

3d. It cannot be ascertained therefrom where the lands mentioned and described in the second paragraph of said complaint as being fifty thousand acres in area are located.

4th. It cannot be ascertained therefrom what, if any, lands owned or possessed by plaintiff, or in

which the plaintiff is in anywise interested, are irrigable under said Deer Flat Reservoir, which it is purposed to construct and maintain.

5th. It does not appear from said amended complaint whether or not said plaintiff purposes using the waters for any purpose connected with any of the constitutional or legal functions of the plaintiff; or whether it purposes furnishing the said waters for use in whole, or in part, by persons other than the United States, for the purpose of irrigating the lands owned or possessed by them.

6th. It does appear from said amended complaint what is the purpose primarily intended by plaintiff in the construction of said reservoir, but it does not appear to what other or further purposes plaintiff intends to devote the land therein sought to be condemned.

7th. It does not appear therefrom whether it is the purpose of plaintiff to devote said irrigation project wholly and entirely to the irrigation of lands owned or possessed by the United States, or whether it purposes to devote said reservoir and project, in part or otherwise, to furnishing water for the purpose of irrigating lands in which the United States has no title, interest or possession, but which are owned and possessed by other persons.

III.

That said amended complaint is ambiguous in the particulars mentioned in the paragraph numbered II hereof.

JNO. G. WILLIS,
Attorney for Defendant.

[Endorsed]: Filed March 4, 1909. A. L. Richardson, Clerk.

**[Order Overruling the Demurrer to the Amended
Complaint, etc.]**

At a stated term of the Circuit Court of the United States, for the District of Idaho, held at Boise, Idaho, on Tuesday the 9th day of March, 1909, Present: Hon. FRANK S. DIETRICH, Judge.

No. 56.

THE UNITED STATES

vs.

DAVID E. BURLEY et al.

On this day the Court announced its decision upon the demurrer to the Amended Complaint herein, heretofore submitted, ordered that said demurrer be and the same is hereby overruled and the defendants are given until Thursday the 11th inst., at 10 o'clock, to answer herein.

*In the Circuit Court of the United States, Central
Division, District of Idaho.*

THE UNITED STATES,

Plaintiff,

vs.

DAVID E. BURLEY et al.,

Defendants.

Answer to Amended Complaint.

The defendant, answering the amended complaint filed herein, says:

I.

He admits the allegations contained in the first paragraph of said complaint.

II.

He admits the allegations contained in the second paragraph of said complaint, save and except,

He *denies* that the Secretary of the Interior is authorized by law, or otherwise, to acquire the therein mentioned lands by condemnation or otherwise.

That he has no knowledge or information sufficient to enable him to form a belief as to the quantity of lands therein averred to be irrigable under said project, or as to whether or not the same will, or can be, supplied with water to irrigate or reclaim the same, as averred in said paragraph; or in whom the title to said lands is vested, for which reason he *denies* each and every averment contained in said paragraph relative thereto, or to any thereof.

He denies that said, or any, lands are necessary for the use of plaintiff in the construction or maintenance of said project, or that it is necessary for plaintiff to acquire title to any lands for said purposes.

III.

He admits each and every allegation contained in the third paragraph of said complaint, save and except,

He denies that Canyon County, Idaho, has, or claims to have, any estate, title or interest in or to said premises, or any part thereof.

IV.

He admits the allegations contained in the fourth paragraph of said complaint, save and except,

He denies that he demands or asks a price for said lands in excess of their worth.

V.

He denies each and every allegation contained in the fifth paragraph of said complaint.

VI.

He denies each and every allegation contained in the sixth paragraph of said complaint, save and except such offers to purchase of plaintiff as may be contained in said paragraph, and defendant avers said lands were, at the *instition* this suit, and now are of the value of \$50.00 per acre, for each and every acre thereof.

VII.

He admits the allegations contained in the seventh paragraph of said complaint.

VIII.

He admits the allegations contained in the eighth paragraph of said complaint.

The defendant, further answering said complaint, and as his further defense to the cause of action attempted to be set forth therein, says:

That he is informed and believes, and, therefore, avers the fact to be that it was and is the design, intention, and purpose of plaintiff to construct the irrigation project mentioned and described in said

amended complaint, for the purpose of supplying water to lands not owned or possessed by plaintiff, or in which plaintiff has any interest of any kind or character, but which are owned and possessed by, and in which, private individuals alone, are interested; and that this proceeding was instituted for the purpose of, and it is the design and intention of plaintiff if successful herein, to devote said land of defendant to said purposes in order to enable plaintiff to irrigate such lands, the title to which is reposed in private ownership, and to further the interests of the owners thereof, and to use and devote plaintiff's lands in aid of private enterprise in the improvement of lands not owned, possessed, or controlled in anywise by plaintiff, or in which it has any right, title, interest or possession of any kind or character whatsoever of a public or governmental nature.

Wherefore, defendant prays that this cause be dismissed at plaintiff's costs.

JNO. G. WILLIS,
Attorney for Defendant.

[Endorsed]: Filed March 11, 1909. A. L. Richardson, Clerk.

State of Utah,
County of Salt Lake,—ss.

David E. Burley, being first duly sworn, on oath, says: I am one of the defendants named and mentioned in the above-entitled cause; that the foregoing pleading is, and the matters therein set forth are, true, except as to such as may be therein averred on

information and belief, and, as to such, I believe the same to be true.

DAVID E. BURLEY.

Sworn to and subscribed before me, this 10th day of March, 1909.

[Seal]

L. B. SWANER,
Notary Public.

Trial [Minutes of the Court—Friday, March 12, 1909].

At a stated term of the Circuit Court of the United States, for the District of Idaho, held at Boise, Idaho, on Friday the 12th day of March, 1909.
Present: Hon FRANK S. DIETRICH, Judge.

No. 56.

THE UNITED STATES

vs.

DAVID E. BURLEY et al.

[Order Allowing the Amendment of the Answer to the Amended Complaint, etc.]

Upon application of the defendants' attorney the said defendant is allowed to amend the 6th paragraph of the answer to the Amended Complaint herein by interlineation. The plaintiff by its counsel here moved the Court to strike part of the answer to said Amended Complaint which motion, was, after argument, allowed by the Court and said defendant given leave to file an Amended Answer to the Amended Complaint, which was done instanter.

Here the defendants by their counsel moved the Court to continue said cause which motion was opposed by counsel for plaintiff, and after argument, the Court ordered that said motion for continuance be and is hereby denied, to which ruling the defendants by their counsel then and there excepted in due form of law, which exception was allowed by the Court, and it was by the Court ordered that said cause be set for trial before a jury upon questions of fact, upon Wednesday the 17th inst. at 10 o'clock A. M.

Thereupon said cause came on to be heard before the Court sitting without a jury upon questions of law alone. The United States District Attorney appearing as counsel for plaintiff and John G. Willis and J. L. Niday, Esqs., appearing as counsel on behalf of defendants.

The following named persons were sworn, examined and cross-examined as witnesses on behalf of plaintiff, to wit:

William Balderston, W. G. Davies, Miss Emma Jacobson and Hugh E. McElroy, after which the Court adjourned the further hearing of said cause until tomorrow the 13th inst. at 10 o'clock A. M.

*In the Circuit Court of the United States, Central
Division, District of Idaho.*

THE UNITED STATES,

Plaintiff,

vs.

DAVID E. BURLEY et al.,

Defendants.

Amended Answer to Amended Complaint.

The defendant, answering the Amended Complaint filed herein, says:

1.

He admits the allegations contained in the first paragraph of the said complaint.

2.

He admits the allegations contained in the second paragraph of said complaint, save and except;

He denies that the Secretary of the Interior is authorized by law, or otherwise, to acquire the therein mentioned lands belonging to plaintiff, by condemnation, or otherwise, for the purposes set forth in said complaint; that he has no knowledge or information sufficient to enable him to form a belief as to the quantity of lands in said complaint averred to be irrigable under said project; or as to whether or not the same will, or can be, supplied with water to irrigate or reclaim the same, as averred in said paragraph; or in whom the title to said lands is vested, for which reasons plaintiff denies that it has become, or is, necessary that the plaintiff herein to secure title to defendant's lands described in said complaint, to use as a part of said or any reservoir site or in anywise or at all; or that said irrigation project is being constructed primarily, or at all, for the purpose of supplying water for the irrigation of arid lands in Ada or Canyon County, Idaho, which are public lands of the United States, and defendant likewise denies that 50,000 acres, or any other quantity of public lands of the United States will be

supplied with water for irrigation or reclamation from said project by means of said Deer Flat reservoir. Defendant denies that said described lands belong to defendant as being included in said reservoir or necessary for the use of the Government in construction of said project; or that it is necessary for plaintiff to acquire title thereto for such purposes.

3.

He admits each and every allegation contained in the third paragraph of said complaint, save and except;

He denies that Canyon County has, or claimed to have, any estate, title or interest in or to said premises or any part thereof.

4.

He admits the allegations contained in the fourth paragraph of said complaint, save and except;

He denies that he demands or asks a price for said lands in excess of their worth.

5.

He denies that the use of said premises is absolutely necessary in the construction of said reservoir.

6.

He denies that the reasonable value of said property does not exceed \$10.00 per acre; on the contrary avers that the reasonable value of said property at the time of the commencement of this action was, and still is, the sum of \$50.00 per acre for each and every acre thereof.

7.

He admits the allegations contained in the seventh paragraph of said complaint.

8.

He admits the allegations contained in the eighth paragraph of said amended complaint.

The defendant, further answering said complaint, and as his further defense to the cause of action attempted to be set forth therein, says:

That he is informed and believes, and, therefore, avers the fact to be that, it was, and is the design, intention, and purpose of plaintiff to construct the irrigation project mentioned and described in said amended complaint for the purpose of supplying water to lands not owned or possessed by plaintiff, or in which plaintiff has any interest of any kind or character, but which are owned and possessed by, and in which, private individuals alone, are interested; and that this proceeding was instituted for the purpose of, and it is the design and intention of plaintiff if successful herein, to devote said land of defendant to said purposes in order to enable plaintiff to irrigate such lands, the title to which is reposed in private ownership; and to further the interests of the owners thereof; and to use and devote plaintiff's lands in aid of private enterprises in the improvement of lands not owned, possessed, or controlled in anywise by plaintiff, or in which it has any right, title, interest or possession of any kind or character whatsoever, or a public or governmental nature.

Wherefore, defendant prays that this cause be dismissed at plaintiff's costs.

J. L. NIDAY,
JNO. G. WILLIS,
Attorneys for Defendant.

State of Utah,
County of Salt Lake,—ss.

David E. Burley, being first duly sworn, on oath, says: I am one of the defendants named and mentioned in the above-entitled cause; that the foregoing pleading is, and the matters therein set forth are, true, except as to such as may be therein averred on information and belief, and, as to such, I believe the same to be true.

DAVID E. BURLEY.

Sworn to and subscribed before me, this 12th day of March, 1909.

[Seal]

JOHN L. NIDAY,
Notary Public.

[Endorsed]: Filed March 12, 1909. A. L. Richardson, Clerk.

*In the Circuit Court of the United States, Ninth
Judicial Circuit, for the District of Idaho, Cen-
tral Division.*

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

D. E. BURLEY et al.,

Defendants.

Motion to Strike Portions from the Amended Answer.

Comes now C. H. Lingenfelter, United States Attorney for the District of Idaho, and on behalf of the United States moves the Court to strike from the amended answer of the defendant's on file herein the following paragraphs, words and figures, to wit:

All that part of paragraph "2" of said amended answer, in the words as follows: "He denies that the Secretary of the Interior is authorized by law, or otherwise, to acquire the therein mentioned lands belonging to plaintiff, by condemnation, or otherwise, for the purposes set forth in said complaint"; for the reason that the same is sham and irrelevant.

All the matters contained in said amended answer and therein designated as "a further answer and further defense to the cause of action attempted to be set forth therein," being that paragraph on page three and following paragraph "8" of said amended answer, for the reason that same is sham and irrelevant.

C. H. LINGENFELTER,

U. S. Attorney and Attorney for Plaintiff.

[Endorsed]: Filed March 13, 1909. A. L. Richardson, Clerk.

**Order Denying the Motion to Strike [Portions from
the Amended Answer].**

At a stated term of the Circuit Court of the United States for the District of Idaho, held at Boise, Idaho, on Saturday, the 13th day of March, 1909.
Present: Hon. FRANK S. DIETRICH, Judge.

No. 56.

THE UNITED STATES

vs.

D. E. BURLEY et al.

The trial of the law issues in this cause adjourned on yesterday for further hearing was this day resumed, the respective counsel being present:

The U. S. Attorney moved the Court to strike out part of Amended Answer to the Amended Complaint, which motion was by the Court denied, to which ruling the plaintiff by its counsel excepted. Here the Court adjourned the further hearing of this cause as to the law issues to another day.

No. 56.

THE UNITED STATES

vs.

DAVID E. BURLEY et al.

Default of Defendant, Canyon County, Idaho.

The defendant, Canyon County, Idaho, having been served with due process of law, and having failed to appear, answer or demur within the time

allowed by law. On motion of the U. S. District Attorney, it is ordered that the default of the said defendant, Canyon County, Idaho, be and the same is hereby duly entered.

In the Circuit Court of the United States, Ninth Judicial Circuit, for the District of Idaho, Central Division.

No. 56.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVID E. BURLEY and the COUNTY OF
CANYON, IDAHO,

Defendants.

Verdict.

We, the jury in the above-entitled cause, find for the defendant David E. Burley, and assess the damages at the sum of \$5,920.00 for the taking of the lands described in the amended complaint filed on the 25th day of February, 1909.

JOHN H. HARRIS,

Foreman.

[Endorsed]: Filed March 19, 1909. A. L. Richardson, Clerk.

*In the United States Circuit Court for the Ninth
Circuit, District of Idaho, Central Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVID E. BURLEY and the COUNTY OF
CANYON, IDAHO,

Defendants.

Findings of Fact and Conclusions of Law.

C. H. LINGENFELTER, Esq., HUGH E. Mc-
ELROY, Esq., C. E. STOUTEMYER, Esq.,
and S. L. TIPTON, Esq., for Plaintiff.

JOHN G. WILLIS, Esq., and J. L. NIDAY,
Esq., for Defendants.

This cause having come regularly on for trial, the defendant, the County of Canyon, not appearing, and its default having been entered and counsel for the plaintiff and for the defendant David E. Burley having stipulated in open court that all issues except that of the value of the land sought to be condemned should be heard before the Court without a jury, and that the question of the value of said land should be submitted to a jury, and a jury having been impanelled, and having, under the instructions of the Court, returned a verdict for the amount agreed upon by counsel for the respective parties, and the Court having announced its decision upon the issues submitted to it in favor of the plaintiff and against the defendant, and the defendant having

requested that the Court make findings of fact, now, therefore, in consideration of the premises, the Court files its findings as follows to wit:

1. That this action is brought by the authority of the Attorney-General of the United States on behalf of the United States, pursuant to an application made therefor by the Honorable Secretary of the Interior of the United States, proceeding under the provisions of an Act of Congress entitled: "An Act appropriating the receipts from the sale and disposal of public lands in certain States and territories for the construction of irrigation works for the reclamation of arid lands," approved June 17, 1902. (32 Stat. L. 388.)"

2. That long prior to the commencement of this action the Honorable Secretary of the Interior, proceeding under authority of said act, caused to be surveyed and located a certain irrigation project in the State of Idaho known as the "Payette-Boise Project," and determined that the same was practicable, and let contracts for the construction thereof, said project being situate in the counties of Ada and Canyon. That said project includes, as a part thereof, the construction of a reservoir in Canyon County, Idaho, commonly known and designated as the "Deer Flat Reservoir," the site of which is a natural basin comprising approximately ten thousand acres of land. That the land described in the amended complaint as belonging to the defendant, the title to which the plaintiff seeks by this action to acquire, are situate within said basin, and will,

if said basin is used as a reservoir site, be covered with water. That said reservoir was, at the time of the commencement of this action, in the actual course of construction. That both the lands embraced in said reservoir site and those in the vicinity thereof are arid in character, and cannot be profitably farmed without artificial irrigation. That of the lands embraced within the reservoir site the plaintiff owned only a small portion, but of the lands adjacent thereto and in the vicinity thereof, and susceptible of irrigation therefrom, the plaintiff was the owner of approximately forty-five thousand acres, and approximately the same amount of lands had passed to patent and were in private ownership. That at the time said project was surveyed and its feasibility considered, all the natural flow of Boise River, the only available source of supply for the irrigation of said and other lands during a large portion of the irrigating season, had been appropriated, and was being diverted by private corporations for the irrigation of agricultural lands, and no considerable additional area could be irrigated except by storing and conserving waters flowing in the river during the winter months, or during the high water season. The project as finally decided upon by the Honorable Secretary of the Interior contemplated the taking over of an existing canal called the "New York Canal," which was to be improved, enlarged, and extended, and through which water was to be carried to said reservoir for the supply thereof during seasons of the year when there was an adequate supply of water in the river for such purpose, and for

delivering water to parties who already had the right to receive water from said canal by reason of existing contracts, and also to furnish water for the irrigation of lands belonging to the plaintiff which were susceptible of irrigation from said canal, and for the irrigation of unreclaimed lands belonging to private individuals, but the entire project was for the irrigation and reclamation of arid lands. That after the Government had made some investigation, but before said project was decided upon, property owners and citizens of said counties of Ada and Canyon entered upon a systematic agitation of the project, and certain individuals, acting upon behalf of the public, and complying with the laws of the State of Idaho relative to securing permits for the appropriation of water, secured permits for such appropriation from the Boise river, and assigned the same to the United States, and the owners of arid lands, for the irrigation of which there was no available water, proffered to the Government their co-operation and assistance, agreeing that if the Government would undertake the project, and thereby furnish water for the irrigation of their lands, they would bear their proportion of the expense thereof. That in consideration of the large tract of public land to be irrigated and reclaimed by means of said project, and such co-operation and assistance from private owners, the Honorable Secretary of the Interior adopted said project, and entered upon its construction. That in order to irrigate some of the public lands lying in the vicinity of said reservoir it is necessary to maintain the water in said reservoir at such a level

as will cause the same to overflow the defendant's land. That at the time said project was being investigated, the public lands lying in the vicinity of said reservoir site and susceptible to irrigation from said reservoir were withdrawn from entry under the public land laws, and since said withdrawal substantially all of said lands have been entered under and subject to the conditions of said reclamation act.

3. That the Honorable Secretary of the Interior entered upon said project of the construction of said reservoir primarily for the purpose of irrigating public lands of the United States, and that the United States has a large and substantial interest in the successful execution of that project, in that thereby water will be rendered available for the irrigation of large tracts of its own lands, thus rendering them marketable; and that, for the purpose of carrying out said irrigation project, it is necessary that the plaintiff acquire the title to the defendant's lands, as the same are described in the amended complaint, in order that it may use them for a part of said reservoir site.

4. That the defendant David E. Burley is the sole owner of said lands, and the County of Canyon has no title thereto or interest therein.

5. That the plaintiff and the defendant David E. Burley were unable to agree upon the value of said lands, or the price to be paid therefor by the plaintiff.

And as conclusions of law from the foregoing facts, it is found that the plaintiff seeks to condemn said lands and to acquire title thereto for a lawful

purpose, and that the Honorable Secretary of the Interior, in entering upon said project, did not exceed the authority conferred upon him by the provisions of said act of June 17, 1902, and that said lands are necessary to such purpose, and that the plaintiff is entitled to ex-appropriate them and acquire title thereto upon the payment to the defendant of a just compensation therefor, namely, the amount found by the jury.

Dated April 3d, 1909.

FRANK S. DIETRICH,
District Judge.

[Endorsed]: Filed April 3d, 1909. A. L. Richardson, Clerk.

*In the Circuit Court of the United States in and for
the Central Division of the District of Idaho.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVID E. BURLEY and the COUNTY OF CANYON,
IDAHO,

Defendants.

Judgment.

This case coming duly on to be heard on the 19th day of March, 1909, and the defendant, David E. Burley, having duly appeared and answered and the defendant, County of Canyon, Idaho, having been duly served with process herein and having failed to appear and the default of the defendant, the County

of Canyon, Idaho, having been duly entered herein, and issues of fact having been raised by the answer of the defendant, Burley, both as to the value of the premises described in the amended complaint and as to the right of the plaintiff to condemn said premises, it was stipulated and agreed by and between the attorneys for the plaintiff and the attorneys for the defendant, Burley, respectively, that the issues as to the value of the premises, and the evidence thereon should be submitted to the jury and that all other issues involved in the case should be tried by the Court without a jury and a finding of facts rendered thereon by the Court, and the defendant, Burley, having appeared and introduced oral and documentary evidence and the plaintiff having appeared and introduced oral and documentary evidence, the jury thereafter brought in its verdict on the issues as to the value of the premises and assessed the damages to the defendant, Burley, on account of the condemnation of said premises at the sum of Five Thousand Nine Hundred Twenty Dollars (\$5,920.00), and all other issues having been tried before the Court and the Court having made its findings fact herein.

Now, therefore, it is ordered, adjudged and decreed by the Court that upon payment of said sum of Five Thousand Nine Hundred Twenty (\$5,920.00) Dollars by the plaintiff to the defendant, David E. Burley, or the Clerk of this Court, decree of condemnation in favor of the plaintiff and against the defendants will be entered herein as provided by law and prayed for in the complaint, for the following described premises, situated in Canyon County,

Idaho, to wit: The Southeast quarter (SE. $\frac{1}{4}$) of Section One (1) Township Two (2) North, Range Three (3) West, containing one hundred sixty (160) acres, and all that part of the Northeast quarter (NE. $\frac{1}{4}$) of Section (12), in said Township Two (2) North, Range Three (3) West B. M. described as follows: Beginning at the Northeast corner of Section Twelve (12), Township Two (2) North, Range Three (3) West, B. M., thence running South 2640 feet to quarter corner between said Section Twelve (12), Township Two (2) North, Range Three (3) West, B. M., and Section Seven (7), Township Two (2) North, Range Two (2) West, B. M., thence West 1160 feet, thence North $62^{\circ} 16'$ West 105 feet, thence North $55^{\circ} 56'$ West 280 feet, thence North $34^{\circ} 36'$ West 520 feet, thence North $41^{\circ} 36'$ West 360 feet, thence North $59^{\circ} 56'$ West 350 feet, thence North $83^{\circ} 26'$ West 380 feet to the line between the Northwest quarter (NW. $\frac{1}{4}$) and the Northeast quarter (NE. $\frac{1}{4}$) of said section Twelve (12), thence North 1490 feet to quarter corner between Section Twelve (12) and Section One (1), both of Township Two (2) North, Range Three (3) West, thence East 2640 feet to the place of beginning, containing 136 acres.

And the default of the defendant, the County of Canyon, Idaho, having been entered herein, it is hereby ordered, adjudged and decreed that said defendant, the County of Canyon, recover nothing and be adjudged to have no right, title or interest in said premises and forever debarred and enjoined from

claiming or asserting any right, title or interest in said premises or any lien thereon.

Done this 9th day of June, 1909.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed June 9th, 1909. A. L. Richardson, Clerk.

*In the Circuit Court of the United States in and for
the Central Division of the District of Idaho.*

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DAVID E. BURLEY and the COUNTY OF CANYON, IDAHO,
Defendants.

Order of Condemnation.

Whereas, on the 9th day of June, 1909, in the above-entitled cause of action a certain judgment of condemnation was rendered by the Court and was filed herein, in which said judgment it is ordered, adjudged and decreed that upon the payment of the sum of Five Thousand Nine Hundred Twenty (\$5,920.00) dollars to the defendant, David E. Burley, or to the Clerk of this Court, Decree of Condemnation in favor of the plaintiff and against the said defendants will be entered herein as provided by law and prayed for in the Complaint.

Now, therefore, it appearing to the Court that said sum has been paid to the Clerk of this Court for the

defendant, David E. Burley, it is ordered, adjudged and decreed that the premises described in said judgment, to wit: The Southeast quarter (SE. $\frac{1}{4}$) of Section One (1), Township Two (2) North, Range Three (3) West, containing one hundred sixty (160) acres, and all that part of the Northeast quarter (NE. $\frac{1}{4}$) of Section Twelve (12), in said Township Two (2) North, Range Three (3) West, B. M., described as follows: Beginning at the Northeast corner of Section Twelve (12), Township Two (2) North, Range Three (3) West, B. M., thence running South 2640 feet to quarter corner between said Section Twelve (12), Township Two (2) North, Range Three (3) West, B. M., and Section Seven (7), Township Two (2) North, Range Two (2) West, B. M., thence West 1160 feet, thence North $62^{\circ} 16'$ West 105 feet, thence North $55^{\circ} 56'$ West 280 feet, thence North $34^{\circ} 36'$ West 520 feet, thence North $41^{\circ} 36'$ West 360 feet, thence North $59^{\circ} 56'$ West 350 feet, thence North $83^{\circ} 26'$ West 380 feet to the line between the Northwest quarter (NW. $\frac{1}{4}$) and the Northeast quarter (NE. $\frac{1}{4}$) of said section Twelve (12), thence North 1490 feet to quarter corner between Section Twelve (12) and Section One (1), both of Township Two (2) North Range Three (3) West, thence East 2640 feet to the place of beginning, containing 136 acres, be and are hereby condemned as provided by law and prayed for in the complaint and that by virtue of this order and judgment herein said premises be and are hereby conveyed from the defendants to the plaintiff herein.

And the default of the defendant, the County of Canyon, Idaho, having been entered herein, it is hereby ordered, adjudged and decreed that said defendant, the County of Canyon, recover nothing and be and is hereby adjudged to have no right, title or interest in said premises and forever debarred and enjoined from claiming or asserting any right, title or interest in said premises or any lien thereon.

Done this 28th day of July, 1909.

R. S. BEAN,
Judge.

[Endorsed]: Filed July 28th, 1909. A. L. Richardson, Clerk.

In the United States Circuit Court for the Ninth Circuit, District of Idaho, Central Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVID E. BURLEY and the COUNTY OF CANYON, IDAHO,

Defendants.

Opinion.

March 29, 1909.

C. H. LINGENFELTER, Esq., HUGH E. McELROY, Esq., B. E. STOUTEMYER, Esq., and S. L. TIPTON, Esq., for Plaintiff.

JOHN G. WILLIS, Esq., and J. L. NIDAY, Esq., for Defendants.

DIETRICH, District Judge:

This is a proceeding in eminent domain, brought

by authority of the Attorney General, on behalf of the United States, to condemn certain lands of the defendant for reservoir purposes, pursuant to an application made therefor by the Secretary of the Interior, proceeding under the provisions of an Act of Congress, entitled: "An Act appropriating the receipts from the sale and disposal of public lands in certain states and territories for the construction of irrigation works for the reclamation of arid lands," approved June 17, 1902. (32 Stat. L. 388.)

By agreement of counsel, all issues excepting that of the value of the lands taken were submitted to the Court without a jury.

Two general questions are presented by the record: Does the law authorize the Secretary of the Interior to construct a project of the character of that for which these lands are sought? And, are the lands reasonably necessary to such construction?

The latter question may be summarily disposed of. Without conflict, the evidence conclusively shows that the reservoir, which is an essential feature of the project irrigation system, cannot be utilized to its full capacity without submerging the defendant's lands. Leaving out of consideration lands privately owned, it will be necessary to maintain the impounded water at a level above the lands in question in order to reach tracts the title to which is still in the Government. It follows that the taking of these lands is necessary, if the plan of irrigation adopted by the Secretary of the Interior is to be carried out. Whether, as has been suggested, an equally feasible,

or more feasible, scheme might not be devised, and whether some other reservoir site might not be selected, are immaterial inquiries; the record discloses no circumstances or conditions taking the case out of the general rule that, in the absence of bad faith, the judgment of the party exercising the right of eminent domain as to what and how much land shall be taken is conclusive.

The other point, the authority of the Secretary of the Interior to engage in such an enterprise, involves somewhat different, though kindred, considerations. Upon the part of the defendant it has been earnestly and persistently urged that the question is foreclosed, adversely to the Government, by the "Kansas-Colorado case." (Kansas vs. Colorado, 206 U. S. 91). But I am unable to yield to this contention. The point in that case was that the Government was claiming some *dominant* right to the waters of the Arkansas river, which was conceded to be a non-navigable stream, and hence not within the jurisdiction of the general Government as a natural highway. The contention for the Government was that, for the purposes of reclaiming arid lands, it has superior authority over, and supervisory control of, the waters in such streams, to the exclusion of state jurisdiction. The conclusion of the Court was that "each state has full jurisdiction over the lands within its borders, including the beds of streams and other waters."

Here no such issue is tendered. The congressional act from which alone the Secretary of the Interior derives his authority expressly provides that in ap-

appropriating, distributing, and using water, he shall proceed in conformity with the laws of this state; and it is not pretended here that the officers of the Government claim, or have claimed, exemption from the limitations of such laws. Without going into details, it may be stated generally that the plaintiff, in prosecuting its work, has followed substantially the same course which, under the laws of Idaho, a private corporation, in appropriating and diverting public waters for the purposes of irrigation, must pursue.

The precise point upon which defendant chiefly relies in urging that the proceeding is without authority of law, is that one of the purposes for which the reservoir is to be used is the irrigation of lands which had passed into private ownership prior to the inception of the project. Whether or not, under the Constitution, Congress is without the power to authorize the expenditure of public money and the exappropriation of private property for the irrigation of private lands exclusively, it is unnecessary at this time to inquire. As I view the act under which the plaintiff is proceeding, it was not intended thereby to confer upon the Secretary of the Interior such authority. At the time the act was passed, the Government was the proprietor of boundless tracts of arid lands, practically worthless in their natural condition. The smaller, more accessible streams has been largely appropriated, for the irrigation of private lands. Private capital had not, to any considerable extent, looked with approval upon the usually speculative and often perilous enterprise of

lifting from the deep canyons, in which they not infrequently flow, the waters of the larger streams, for the irrigation of great bodies of land, as yet either wholly unoccupied, or at most but sparsely settled; and as a rule such lands would not be purchased or entered without some assurance of water for their future irrigation. Contemplating these conditions, Congress passed this act, primarily for the reclamation of these public lands. The Government, as a proprietor, was directly interested in a pecuniary way in improving and rendering marketable that for which, in its natural condition, there was neither use nor demand. But in carrying out this purpose, it was foreseen that the administrative officers would encounter conditions where it would be both impracticable and unjust for them to proceed without the co-operation of private owners. Of any specified tract, a considerable portion may have passed into private ownership before the law was enacted, or after the enactment, but before the land could be preliminarily withdrawn from entry. It might be impracticable for the Government to proceed to the irrigation of the residue of public land in such a tract, unassisted by private owners, because of an inadequate acreage to justify the expense necessarily entailed by the magnitude of the enterprise. There would be no practicable relation between the cost of the project and the value of the lands owned by the Government when supplied with water for irrigation. And, if practicable for the Government to proceed alone, injustice might be done to private owners where the aggregate of private lands is so

small that an enterprise intended exclusively for their irrigation is not feasible. Generally speaking, the larger the area supplied the less the acreage charge for water, and hence, as a usual thing, it is highly desirable, and not infrequently absolutely essential to success, that all owners of lands embraced in the same general tract join in the construction and maintenance of the primary irrigation works.

That the act clearly contemplates such co-operation between the Government and private owners is not open to discussion; and I am unable to yield to the view that Congress, by reason of any constitutional limitations, is precluded from authorizing such a sensible and necessary mode of procedure, if the Government is to render available for use, and marketable, large tracts of its own land.

It remains briefly to state the facts pertinent to this point, as disclosed by the record. To the original complaint, which was silent as to the ownership of the lands to be irrigated from the reservoir, a demurrer was sustained, and, complying with the suggestions of the Court, the plaintiff, in its amended complaint, alleged that the project was primarily for the irrigation of public lands, which were described in a general way. This allegation was denied, and upon the issue thus joined much evidence was received, wide latitude being given to both parties.

It appears that long prior to the commencement of this cause, the Secretary of the Interior, proceeding under authority of the act referred to, caused to

be surveyed and located the Boise-Payette irrigation project, a feature of which is the reservoir in question, and determined that the same was practicable, and let contracts for the construction thereof.

The reservoir, designated as the "Deer Flat," is in a natural basin comprising approximately 10,000 acres of land. Of the land embraced within the site, the plaintiff owns only a small portion, but of the lands adjacent thereto and in the vicinity thereof, and susceptible of irrigation therefrom, it was the owner of approximately 45,000 acres, and approximately the same amount, in the aggregate was owned by private individuals, all being arid lands.

At the time the project was first surveyed and its feasibility considered, all the natural flow of the Boise River, the only available source of supply for the irrigation of these and other lands during the larger portion of the irrigating season, had been appropriated and was being diverted by private corporations for the irrigation of agricultural lands, and no considerable additional area could be irrigated except by storing and conserving waters flowing in the river during the winter months and during the high water season.

The project as finally decided upon involved the taking over of an existing system, called the New York Canal, which was to be improved, enlarged, and extended and through which water was to be carried to the reservoir during the season of the year when there was an adequate supply in the river for such purpose and for delivering water to parties who already had the right to receive water there-

from by reason of existing contracts, and also to furnish water for the irrigation of lands belonging to plaintiff, and for the irrigation of unreclaimed lands belonging to private individuals; but the entire project was for the irrigation and reclamation of arid lands.

After the Government had made some investigation, but before the project was finally decided upon, property owners and citizens of Ada and Canyon Counties, where the lands are situated, entered upon a systematic agitation to promote the plan, and certain individuals, acting on behalf of the public, and complying with the laws of this State relative to the issuing of licenses for the appropriation of water, secured permits for such appropriation from the Boise river, and afterwards assigned the same to the United States; and the owners of arid lands, for the irrigation of which there was no available water, proffered to the Government their assistance and co-operation, agreeing that if the Government would undertake the project, and thereby furnish water for the irrigation of their lands, they would bear their proportion of the expense.

In consideration of the large tracts of public land to be irrigated, and such assistance and co-operation by private owners, the project was adopted.

Upon the record, there can be no question that the primary purpose of the project is the irrigation of public lands, and that the officers of the Government are not engaged in a scheme which is ostensibly for the irrigation of public lands but which is, in reality, for the irrigation of private lands. The Govern-

ment's holdings are so extensive, and it has such a substantial pecuniary interest in the project, and it would receive such a direct benefit from it in the improvement of its own lands that it cannot be said that its officers have resorted to the subterfuge of including a few acres of Government lands in the scheme for the purpose of basing a claim, in bad faith, that its purpose is the irrigation of Government land.

There is no evidence of any design to evade the provisions of the law, or, by indirection, to exceed the authority thereby conferred. The Government had large tracts of land of its own which it was impracticable to irrigate unless it could receive the assistance and co-operation of private owners; it sought that assistance, at least it gave out that it would not undertake to irrigate its own lands unless it did have such co-operation from private owners. The latter agreed to join in the enterprise, and the work was commenced. My conclusion, therefore, is that the project is within the law.

The jury having already determined the value of the lands to be taken, there remains no other question, and an order for judgment of condemnation will be entered in accordance with plaintiff's prayer.

Memorandum of oral decision rendered March 29, 1909.

[Endorsed]: Filed August 25th, 1909. A. L. Richardson, Clerk.

*In the Circuit Court of the United States, Central
Division, District of Idaho.*

AT LAW.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

DAVID E. BURLEY and the COUNTY OF
CANYON, IDAHO,
Defendants.

Petition for Writ of Error.

Comes now David E. Burley, defendant herein and says:

That about the 9th day of June, 1909, this Court entered its judgment herein, in favor of the said plaintiff, and against this defendant, David E. Burley, and thereafter, to wit, on or about the 28th day of July, 1909, this Court made and entered its Order of Condemnation in this cause in favor of the said plaintiff, and against this defendant; in each of which said Judgment, and Order of Condemnation, and the proceedings had prior thereto, and to each thereof, in this cause certain errors were committed, to the prejudice of this defendant; all of which will more in detail appear from the Assignment of Errors, which is filed with this petition.

Wherefore, this defendant prays that a Writ of Error may issue in this behalf to the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of, and that a

transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to said Circuit Court of Appeals.

JOHN G. WILLIS,
Attorney for Defendant.

[Endorsed]: Filed Nov. 3, 1909. A. L. Richardson, Clerk.

*In the Circuit Court of the United States, Central
Division, District of Idaho.*

AT LAW.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

DAVID E. BURLEY and the COUNTY OF
CANYON, IDAHO,
Defendants.

Assignment of Errors.

The defendant, David E. Burley, in connection with his Petition for a Writ of Error filed herein, makes the following Assignment of Errors which he avers occurred at the trial of said cause, and upon which he will rely, and urge in the Circuit Court of Appeals, that is to say:

1st.

The Court erred in overruling said defendant's demurrer to the Amended Complaint filed herein;

2d.

The Court erred in making its conclusions of law herein;

3d.

The Court erred in entering judgment in favor of plaintiff, and against this defendant;

4th.

The Court erred in making and entering the Order of Condemnation herein.

JOHN G. WILLIS,
Attorney for Defendant.

[Endorsed]: Filed Nov. 3, 1909. A. L. Richardson, Clerk.

—

*In the Circuit Court of the United States, Central
Division, District of Idaho.*

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

DAVID E. BURLEY and the COUNTY OF
CANYON, IDAHO,
Defendants.

Order Allowing Writ of Error, etc.

This, the 5th day of November, 1909, came the defendant, David E. Burley, by John G. Willis, his attorney, and filed herein and presented to the Court his petition, praying for the allowance of a writ of error intended to be urged by him, praying, also, that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Ninth Judicial Circuit, and that such other and further pro-

ceedings may be had as may be proper in the premises.

On consideration whereof, the Court does allow the writ of error upon the said defendant giving bond, according to law, in the sum of Two Hundred Dollars, as in such case made and provided.

November 5th, 1909.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed Nov. 5th, 1909. A. L. Richardson, Clerk.

*In the Circuit Court of the United States, Central
Division, District of Idaho.*

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

DAVID E. BURLEY and the COUNTY OF
CANYON, IDAHO,

Defendants.

Bond on Writ of Error.

Know all Men by These Presents: That we, David E. Burley, as principal, and F. R. Coffin and J. E. Clinton, Jr., of Boise, Idaho, as sureties, are held and firmly bound unto the United States of America, the plaintiff in the above-entitled cause, in the full and just sum of Two Hundred Dollars (\$200.00) to be paid to the said plaintiff, its certain attorneys, successors, or assigns; to which payment, well and truly to be made, we bind ourselves our heirs, ex-

ecutors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this the 10th day of Nov., 1909.

Whereas, lately at a Circuit Court of the United States, for the District of Idaho, in a suit depending therein between the said United States of America, as plaintiff, and the said David E. Burley, and the County of Canyon, Idaho, as defendants, a judgment and decree of condemnation was rendered, made and entered, against the said David E. Burley (the said County of Canyon having defaulted, and its act of so doing having been duly entered, etc.), and the said David E. Burley having obtained a Writ of Error, and filed a copy thereof in the office of the Clerk of said Court, to reverse the said judgment in said suit, as to said David E. Burley, and a citation, directed to the said United States, citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, Calif., in said circuit, on the 27th day of December, next.

Now, the condition of the above obligation is such, that if the said David E. Burley shall prosecute said Writ of Error to effect, and answer all damages and costs if he fail to make good the said plea, then the

above obligation to be void; else to remain in full force and virtue.

DAVID E. BURLEY. [Seal]

F. R. COFFIN. [Seal]

J. E. CLINTON, Jr. [Seal]

Sealed and delivered in presence of:

As to DAVID E. BURLEY,

H. B. THOMPSON, Witness.

As to F. R. COFFIN,

FRED BROWN, Witness.

As to J. E. CLINTON, Jr.,

FRANK S. STEWART, Witness.

State of Idaho,

County of Ada,—ss.

F. R. Coffin and J. E. Clinton, Jr., the sureties in the above undertaking, being duly sworn, each, on oath, says:

I am a resident, and a householder within the Federal District of Idaho, and am worth the sum specified in the said undertaking as the penalty thereof, over and above all my just debts and liabilities, exclusive of property exempt from execution.

F. R. COFFIN.

J. E. CLINTON, Jr.

Sworn to by the said affiants before me, and by them each subscribed in my presence, this, the 13th day of November, 1909.

[Seal]

B. W. WALKER,

Notary Public.

The above undertaking approved.

FRANK S. DIETRICH,

Judge.

[Endorsed]: Filed Nov. 29, 1909. A. L. Richardson, Clerk.

[Writ of Error (Original).]

The United States Circuit Court of Appeals, for the Ninth Circuit.

The United States of America,
Ninth Judicial Circuit,—ss.

The President of the United States, to the Honorable
Judge of the Circuit Court of the United States,
for the District of Idaho, Central Division,
Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Circuit Court before you, between the United States, as plaintiff, and David E. Burley, and Canyon County, Idaho, as defendants, a manifest error hath happened, to the great damage of the said David E. Burley, defendant, as by his complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, Cal., in said circuit, on the 27 day of December, next, in said Circuit Court of Appeals, to be then there held, that the record and proceed-

ings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

FRANK S. DIETRICH,
U. S. District Judge.

Witness the Honorable F. S. DIETRICH, Judge of the District Court of the United States, this, the 29th day of Nov., 1909, and in the 133d year of the Independence of the United States of America.

[L. S.] Attest: A. L. RICHARDSON,
Clerk.

[Endorsed]: No. 56. U. S. Circuit Court, Central Division, District of Idaho. The United States vs. David E. Burley, et al. Writ of Error. Filed Nov. 29, 1909. A. L. Richardson, Clerk.

In the United States Circuit Court of Appeals in and for the Ninth Circuit.

THE UNITED STATES OF AMERICA,
Plaintiff and Defendant in Error,

vs.

DAVID E. BURLEY,
Plaintiff in Error,

and

THE COUNTY OF CANYON, IDAHO,
Defendants.

Citation [Original].

The United States of America,
Ninth Judicial Circuit,
District of Idaho, Central Division,—ss.

To The United States of America, and the County
of Canyon, Idaho, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, Calif., in said circuit on the 27th day of December, next, pursuant to a Writ of Error filed in the clerk's office of the Circuit Court of the United States for the District of Idaho, Central Division, wherein David E. Burley is plaintiff in error, and you are defendant in error; to show cause if any there be, why the judgment rendered against the said plaintiff in error, as in said writ mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this, the 29th day of Nov., 1909, and of the Independence of the United States of America, the 133d.

FRANK S. DIETRICH,

District Judge.

[Seal]

Attest: A. L. RICHARDSON,

Clerk.

I hereby certify that I received the within Citation at Boise, Ada County, Idaho, on November 29th,

1909, and that I served the same upon The United States of America by handing to and leaving with C. H. Lingenfelter, United States Attorney for the District of Idaho, personally, a copy of the within Citation at Boise, Ada County, Idaho, on December 6th, 1909; and I hereby further certify that I served the within Citation upon the County of Canyon, Idaho, by handing to and leaving with James Vanderdossen, Chairman of the Board of County Commissioners of Canyon County, Idaho, personally, a copy of the within Citation about five miles west from Emmett in Canyon County, Idaho, on December 7th, 1909.

Boise, Idaho, Dec. 8, 1909.

S. L. HODGIN,
U. S. Marshal.

By E. W. Beemer,
Deputy.

[Endorsed]: (Original.) No. 56. U. S. Circuit Court, Central Division, District of Idaho. The United States vs. David E. Burley et al. Citation. Filed on return this 8th day of December, 1909. A. L. Richardson, Clerk.

Return to Writ of Error.

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United

States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

[Seal] Attest: A. L. RICHARDSON,
Clerk.

[Certificate of Clerk U. S. Circuit Court to Transcript of Record.]

In the United States Circuit Court, Ninth Judicial Circuit, District of Idaho.

THE UNITED STATES OF AMERICA,
Defendant in Error,
vs.

DAVID E. BURLEY, Plaintiff in Error, and The
COUNTY OF CANYON, IDAHO,

I, A. L. Richardson, Clerk of the Circuit Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 66, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above-entitled cause, and that the same together constitute the transcript of the record herein upon Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the record herein amounts to the sum of \$44.80, and that the same has been paid by the plaintiff in error.

Witness my hand and the seal of said Court at Boise in said District this 8th day of December, 1909.

[Seal] A. L. RICHARDSON,
Clerk.

[Endorsed]: No. 1803. United States Circuit Court of Appeals for the Ninth Circuit. David E. Burley, Plaintiff in Error, vs. The United States of America and The County of Canyon, Idaho, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States Circuit Court for the District of Idaho, Central Division.

Filed December 27, 1909.

F. D. MONCKTON,
Clerk.